Petition

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1981

VALERIE HELGESEN,

Petitioner,

-vs.-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

(1) Was the representation by counsel at trial a "farce and mockery" so as to deprive Petitioner of a fair trial?

(2) Should the Second Circuit Rule be modified as to counsel's performance as to fall in line with the standards set by the other circuits?

(3) Was the Petitioner who had just shortly before attempted suicide, in a competent state of mind to stand trial?

(4) Under all of the circumstances, did the Petitioner knowingly and intelligently waive a jury trial?

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IN THE SUPREME COURT OF THE UNITED STATES
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VALERIE HELGESEN,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Your Petitioner, VALERIE HELGESEN, respectfully prays that a writ of certiorari issue ot review a determination of the United States Court of Appeals for the Second Circuit rendered on January 14, 1982, affirming a Judgment of the United States District Court for the Eastern District of New York, convicting the Petitioner of violations of 18 U.S.C. 1014 dealing with false statements to a federally insured bank and 15 U.S.C. sec. 1644(a) dealing with the knowing use of lost, stolen or fraudulently obtained credit cards to obtain sums of money from Citibank. After a trial without jury before Judge Neaher, the petitioner was convicted of 23 counts involving the above charges in a decision dated April 15, 1981. The deci-

sion can be found annexed herein as Appendix "A". Petitioner was sentenced on September 1, 1981, to a term of three years imprisonment concurrent as to each count to serve 6 months pursuant to Title 18 Section 3651, balance suspended as to each count, 5 years probation.

JURISDICTION

The Judgment of the aforesaid Court of Appeals was rendered and entered on or about January 14, 1982 (the Opinion is annexed as Appendix "A").

The Jurisdicction of this Court is invoked under 28 U.S Code Section 1204. The basis for jurisdiction in the United States District Court was the provision of Title 15 U.S.C. sec. 1644(a) and Title 18 U.S.C. 1014.

STATUTES INVOLVED

The Statuutes involved are Title 15 U.S.C. sec. 1644(a) and Title 18 U.S.C. 1014 and the Sixth Amendment to the Constitution. The pertinent provisions of these statutes are set forth in Appendix "C" infra.

STATEMENT OF FACTS

Prior to the commencement of the trial of this matter, on July 15, 1980, a hearing was held regarding the competency of the Petitioner to stand trial. Three days earlier, the Petitioner had attemmpted suicide and was taken to St. Vincent's Hospital for having consumed alcohol and valium. The Petitioner was found to be competent to stand trial. The Petitioner then waived her right to a jury trial.

A judge trial then commenced with testimony that Valerie Helgesen and a friend opened a decorating business in 1978. The two opened a business checking ac-

count at Citibank. In January of 1979, the two partners applied to Citicorp Sales Management Systems for a merchant's credit card account which would allow the women to accept Visa and Mastercharge.

In July of 1979 Blangiardo left the business. During the first seven months of 1979, credit card sales at the store varied between five hundred and fifteen hundred dollars per month. Between August 17, 1979 and September 24, 1979, credit card sales slips totalled almost two hundred and fifty thousand. Evidence disclosed that most of the money generated came from credit cards which had been reported lost or stolen. Numerous credit cards holders testified as to the loss of their cards. Four tellers from the Brooklyn Heights Citibank testified that the Petitioner was involved in deposits and other transactions at various times at their bank. The government's contention is that the sums of money were appropriated by the Petitioner.

The defense called a series of character witnesses. The Petitioner did not testify nor were any substantive witnesses called on her behalf.

In June of 1981, Petitioner through new counsel made a motion for a new trial or in the alternative, to allow the defense to reopen its case in order to put on additional proof. The Motion was denied by the Trial Court.

REASONS FOR GRANTING THE WRIT

I

THE CONVICTION OF THE PETITIONER SHOULD BE SET ASIDE BECAUSE THE REPRESENTATION BY TRIAL COUNSEL WAS SUCH AS TO CONSTITUTE A "FARCE" AND "MOCKERY" OF JUSTICE

The representation by defense counsel at trial was completely below the standard set by this Circuit, as to warrant a reversal of the conviction.

The Petitioner was represented by the same attorney through a trial which lasted many days. As is discussed in a later Point, for some inexplicable reason, the Petitioner, through counsel, waived a jury trial. In May of 1981, some time after the Court had rendered its verdict in the matter, the Petitioner chose new counsel to represent her. In a Motion dated June 10, 1981, new counsel made a motion for a new trial or, in the alternative, to allow the defense to reopen its case in order to put on additional proof.

The trial without jury of this matter commenced on July 15, 1980, and testimony ended on July 28, 1980. At the trial the government called approximately 50 witnesses. It is submitted that the vast majority of the witnesses dealt with either the keeping of certain records pertaining to the stolen credit cards; the procedures involved in the reporting of the stolen cards and the credit card holders who reported the lost or stolen credit cards. A perusal of the trial record makes it clear that counsel confined her efforts in cross examining the above categories of witnesses who had little to do with the real issues of the case.

The gravaman of the charges for which the Petitioner stood accused, dealt with her knowingly and willfully

engaging in criminal conduct involving the use of a number of stolen credit cards. To put it simply, the issue in this case dealt with Ms. Helgesen's intent.

The issue in the trial did not deal with the fact that persons all of reputable backgrounds had credit cards lost or stolen. Many hours were spent in cross examining these witnesses as to their credibility in regard to the loss of the cards. It was an absurdity for counsel to have expended such effort in this type of examination. As a matter of fact, instead of requiring these witnesses to have been brought in from all over the country, counsel could have stipulated to their testimony without having interfered with the Petitioner's rights.

In a lengthy letter which was submitted by the Defendant to the Court in aid of sentence, it is clearly shown that the issue in the case dealt with the Petitioner's state of mind at the time of this fraudulent scheme. As was stated in the Defendant's letter, her state of mind was such that she was readily manipulated by an individual named Eddie Asad.

In counsel's closing memorandum on behalf of the Petitioner, she reiterates the fact that the above is indeed the defense by the following:

> "Asad's behavior is consistent with guilt; the Defendant's behavior and conversation is consistent with innocence . . . "

In the proposed findings of law in the same closing argument, counsel states the following:

> "The proof establish that Adeed Asad conducted transactions in the nature of cashing checks and making deposits in the absence of the Defendant with respect to the Height Home Boutique Citibank account. See tellers' testimony: X, 91-92, 93, 13-20. It cannot be ascertained which, if any,

deposits of sales slips were made to this account by the Defendant or with the Defendant's knowledge, or which checking transactions, or how many, were conducted by Asad alone.

The Defendant argues that the testimony and exhibits presented by the Government establishes an inference that, in all probability, Asad accomplished the "deposit" of fraudulent sales slips to the Heights Home Boutique account alone, without the Defendant's knowledge or performance of any act in furtherance of his scheme. The sole proof of Defendant's possible involvement is that she signed certain checks (Gov't. Exhs. 21-50) and certain credit/sales summaries (Gov't. Exhs. 11 and 12) also bearing Asad's fingerprints (Gov't. Exh. 206). This proof is insufficient to establish Defendant's knowledge of a fraudulent credit card scheme at the relevant times because there may have been, and in any event the Defendant was told, that another store was in operation in which Asad was involved and to which the bank transactions on this account related. The bank tellers so testified X 19, X85. The defendant could have entrusted checks and credit/sales summaries signed in blank to Asad for this apparently legitimate purpose. No evidence connects the Defendant with the fraudulent sales slips or with a fraudulent credit card scheme.

In view of the permissible inference that Asad perpetuated the fraud without Defendant's knowledge or knowing participation and in view of the failure of proof beyond a reasonable doubt of the elements of the offenses discussed above, the Court finds the Defendant not guilty on all Counts of the superceding indictment, and orders that a Judgment of acquittal be entered herein."

The record presented at trial is completely devoid of the kinds of facts and testimony necessary to raise the type of inference counsel makes in her closing arguments.

Counsel presented no meaningful defense whatsoever to establish the theory of Asad's culpability and the Peti-

tioner's innocence. The only witnesses called by trial counsel were three character witnesses who added nothing as to the facts in this trial.

In the June 10, 1981, Motion for a new trial which was filed, it was made known that potentially there were a number of witnesses available who could have testified to the Defendant's state of mind at the time of the fraudulent scheme.

At the time of the schemes charged in the indictment, the Defendant was in a psychological condition bordering on that of a total breakdown. See also in this connection the psychological report of Dr. Graham which was offered at the time of sentencing.

Further evidence of the type of witnesses who were available and for some unexplainable reasons were not used, can be found in a statement made by Ms. Helgesen's mother and sister to the Court during the July 16, 1981 proceeding for a new trial:

"MRS. HELGESEN: Your Honor, may I speak to you? I am Valerie's mother.

THE COURT: I Understand.

MRS. HELGESEN: What I want to know is, please, why wasn't I brought upon on the stand during this trial, because I have evidence truthfully about this Eddie, that I saw him using my daughter's machine, and I said to him, 'Why are you using my daughter's machine?'

Now this is after Valerie had her business at her home. And he said, 'I did some electrical work for a man in New York, and he doesn't have the cash to pay me. He gave me his card.'

I said, 'Why? You have no right I have never heard of anything like that. How can you possibly use my daughter's machine?'

In the meantime, Valerie, as I said before, lost her name, her store; the rent wasn't paid in three months, and there

was an eviction notice on her door. How do you think—in which state of mind this girl was to find—

MS. HELGESEN: I was her sister, and she was drunk all the time and taking Valium all the time and that is the truth."

Again there is no plausible reason why these individuals were not put on the witness stand as part of the defense.

In speaking again about Asad, the mother said the following to the Court:

"He came to the restaurant where I worked, this man with my daughter, she was under the influence of pills and liquor, and I never saw my daughter look like this, never.

He wanted to know if I could give him some American Express that he could—

I said, 'For what?'.

He said, 'Because Valerie ran out of them'—

The inescapable conclusion that must be drawn is that counsel's performance was a mockery and totally unacceptable even by this Circuit's strict rule.

Many of these issues were discussed in the Motion dated June 10, 1981, and yet the Trial Judge did not grant an evidentiary hearing.

In *United States v. Aulet,* 618 F.2d 182, (CA 2nd Cir.) this Court, at pps. 185-186 spoke of the advisability of holding a hearing in regard to the adequacy of counsel, so that a full factual record could be made before a decision is reached.

Aulet discusses the standard for judging in the assistance of counsel at page 187:

"The standard for judging assistance of counsel in this circuit was established in United States v. Wight, 176 F 2d 376, (2d Cir. 1949) cert. denied 338 U.S. 950, 70 S. Ct. 478,

94 L. Ed. 586 (1950), and was recently upheld in Indiviglio v. United States, 612 F 2d 624 (2nd Cir. 1979):

> Unless the purported representation by counsel was such as to make the trial a farce and a mockery of justice, mere allegations of incompetency or inefficiency of counsel will not ordinarily suffice as grounds for the issuance of a writ of habeus corpus. United States v. Wight 176 F 2d at page 379."

Trial counsel, for a reason clearly not indicated, failed to make a Motion for a pre-trial identification hearing even though numerous bank tellers who testified were asked to look at photo arrays; see *United States v. Wade,* 388 U.S. 218, 87 S. Ct. 1926, 18 L.Ed. 2d 1149 (1967). In *Saltys v. Adams,* 465 F 2d 1023, 1028 (2 Cir. 1972) the failure to ask for a Wade hearing constituted ineffective assistance where a viable Wade argument was apparent. We are not suggesting that the failure to hold the "Wade" hearing alone would constitute inadequate representation, but is certainly a compelling factor along with the other aspects of trial counsel's performance.

In *LiPuma v. Com'r. Dept. of Correction, State of New York,* 560 F 2d 84 at page 92, the Court stated that prejudice resulting from counsel's alleged neglect must be actual and not merely possible.

In the instant case the prejudice was actual in that the inept performance of counsel was such as to prevent any semblance of a defense. The Petitioner did not take the witness stand because she was advised by counsel that she was not up to the ordeal, despite the Petitioner's reiteration of a request to testify in a letter written at the time of sentencing.

It was the Petitioner whose testimony was indispensable for the presentation of the defense of this matter.

Here there was a total failure to present the cause of the accused in any fundamental respect, *Brubaker v.*

Dickson, 310 F 2d 30, 39 (9th Cir. 1962), cert. denied, 372 U.S. 978, 83 S. Ct. 1110, 10 L.Ed. 2d 143 (1963).

The criticism of counsel here is more than just a complaint or second guess of tactical errors or mistakes in strategy, see *United States v. Duhart,* 269 F 2d 113 (2d Cir. 1959).

This matter goes deeper than the possibility that other counsel would have given sounder advice, see *United States v. Garguillo,* 324 F 2d 795 (1963). Here it appears that there was no type of sound advice given.

If Petitioner has testified at trial, she could have shed some light as to her mental condition, her relationship with the real perpetrator Asad and could have given some insight into how the business was being run and how her drug and alcohol problem was brought about by reversals in her personal and business life. She would also have all but eliminated any thought that she has the requisite intent to make out the crimes charged.

Representation at this trial was so woefully inadequate as to make the trial a farce and mockery of justice. *United States v. Wight,* 176 F 2d 376, 379 2d Cir. 1949, cert. denied, 338 U.S. 950, 70 S. Ct. 478, 94 L.Ed. 586 (1950).

Here more than one specific instance of prejudice has been shown so as to deny the Appellant the effective assistance of counsel, see *United States v. Carrigan,* 543 F 2d 1054, *United States ex rel. Testamark v. Vincent,* 496 F 2d 641, 643-44 (2 Cir. 1974), *United States v. Bubar,* 567 F 2d 192 (1977).

It is submitted that counsel's performance was inadequate under the "farce and mockery" rule. However, Judge Oakes, dissenting, in *Rickenbacker v. Warden Auburn Correctional Facility,* 550 F 2d 62 (1976) speaks out about this Circuit adopting a "reasonable competency rule." Surely any rule less demanding that the "farce and

mockery" rule would clearly be grounds for the reversal of this conviction.

The more liberal and lenient standards adopted by the other circuits include the following, see *United States v. DeCoster,* 159 U.S. App. D.C. 326, 331, 487 F 2d 1197, 1202 (D.C. Cir. 1973) ("reasonably competent assistance"); *Moore v. United States,* 432 F 2d 730, 736 (3rd Cir. 1970) (en banc) ("customary skill and knowledge"); *Marzullo v. Maryland,* 561 F 2d 540, 543-44 (4th Cir. 1977), cert. denied, 435 U.S. 1011 98 S. Ct. 1885, 56 L.Ed. 2d 394 (1978) ("normal competency"); *United States v. Gray,* 565 F 2d 881, 887 (5th Cir.), cert. denied, 435 U.S. 955, 98 S. Ct. 1587, 55 L.Ed. 2d 807 (1978) ("reasonably effective counsel"); *United States v. Toney,* 527 F 2d 716, 720 (6th Cir. 1975), cert. denied sub nom., *Pruit v. United States,* 429 U.S. 838, 97 S. Ct. 107, 50 L.Ed. 2d 104 (1976) ("reasonably effective assistance"); *United States ex rel. Williams v. Twoney,* 510 F 2d 634, 641 (7th Cir.), cert. denied sub nom., *Sielaff v. Williams,* 423 U.S. 876, 96 S. Ct. 148, 46 L.Ed. 2d 109 (1975) ("minimum standard of professional representation"); *Morrow v. Parratt,* 574 F 2d 411, 412-13 (8th Cir. 1978) ("customary skills and diligence"); *Cooper v. Fitzharris,* 586 F 2d 1325, 1327 (9th Cir. 1978) (en banc), cert. denied 440 U.S. 974, 99 S. Ct. 1542, 59 L.Ed. 2d 793 (1979) ("reasonably competent and effective.")

In *United States v. DeCoster,* 487 F 2d 1197 at page 1203, the Court stated that:

> "Counsel should confer with his client without delay and as often as necessary to elicit matters of defense, or to ascertain that potential defenses are available. Counsel should discuss fully potential strategies and tactical choices with his client."

Counsel certainly didn't follow the reasonable instruction of *United States v. DeCoster.*

The standard for effectiveness is not easily reduced to precise words capable of rigid application, *Garton v. Swenson,* 497, 2d 1137 (CA 8th Cir.).

One must also consider in assessing the representation, no matter which standard is followed, that counsel made no opening statement nor did she make a summation in this matter. Instead, the Court was presented with a closing memorandum which came to conclusions and made inferences completely unsupported by the evidence.

In order to attempt to cure some of the glaring deficiencies of trial counsel's representation, a Motion dated June 10, 1981 was made in which, among other things, the Court was requested, in view of the fact that this was a non-jury trial to allow the re-opening of the defense case. This Motion was denied by Judge Neaher on July 16, 1981.

In *People v. Bennett,* 29 N.Y. 2d 466, 329 N.Y.S. 2d 80 at page 804, the New York Court of Appeals makes the following observation:

> "It is impossible to define with any precision what constitutes 'inadequate' or 'ineffective' legal representation or to formulate standards which will apply to all cases. But, at the very least, the right of a Defendant to be represented by an attorney means more than just having a person with a law degree nominally represent him upon a trial and ask questions."

Trial counsel expended effort as to mere technicalities such as whether Citibank was insured by the FDIC and tried to narrow the scope of admissibility of the business records in the case, but in doing so she completely neglected the main issues and the presentation of a meaningful defense. It is true that effort was shown, but such effort was completely misdirected and misguided.

The trial judge received only a small part of the factual situation of the incidents involved in the indictment.

If the defense had been handled in a way consistent with the standards set by this Circuit, then it is certain that the Court would have had an entirely different set of issues to judge as to guilt or innocence of the Defendant.

The Petitioner was deprived of her right to effective and constitutionally adequate counsel as mandated in the Sixth Amendment to the Constitution.

II

THE PETITIONER, BECAUSE OF ALL OF THE CIRCUMSTANCES, WAS NOT COMPETENT TO STAND TRIAL IN DEPRIVATION OF THE PETITIONER'S SIXTH AMENDMENT RIGHTS

Because of all of the circumstances surrounding the Petitioner as pointed out in Point III, it is clear that the Petitioner was not competent to stand trial and the matter should have been adjourned in spite of the urgings to go ahead by counsel who was far less than adequate.

A defendant who is convicted while incompetent has been denied due process, see e.g. *Pate v. Robinson,* 383 U.S. 375, 86 S. Ct. 836, 15 LEd. 2d 815 (1966); *Bishop v. United States,* 350 U.S. 961, 76 S. Ct. 440, 100 L. Ed. 835 (1956).

In *United States v. David,* 511 F 2d 355 (D.C. CA), the Court made the following remarks about the determination of competency:

> "This Court recognizes that in making a competency determination it may be useful for the trial judge to question both the Defendant and his counsel; the applicable criteria measure one's ability to consult with his lawyer and to understand the course of legal proceedings. Thus counsel's first-hand evaluation of a Defendant's ability to consult on his case and to understand the charges and proceedings against him may be as valuable as an expert psychiatric opinion on his competency . . . "

In the case for consideration here, it seems counsel was more concerned about measures to prevent suicide than in describing for the Court the Petitioner's state of mind.

A suicidal defendant such as the Petitioner was, is certainly one who should have been scrutinized thoroughly as to competency.

An accused is considered to have the mental capacity to stand trial if he has sufficient present ability to consult with his attorney with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him, *Dusky v. United States,* 362 U.S. 402, 80 S. Ct. 788, 4 L.Ed. 2d 824 (1960).

In regard to the question of competency, inquiry should have been made as to whether the Defendant was under medication.

In *Hansford v. United States,* 124 U.S. App. D.C. 387, 365 F 2d 920, 923 (1966) the Court stated that a competency hearing should have been held under the circumstances of that case, to see what the exact effects of narcotics were on the particular defendant had been.

Here, no inquiry was made as to whether the Petitioner was using or taking medication at about the time of the commencement of the trial.

In *United States v. Zovluck,* 425 F Sub. 719, the Court made the following observation about incompetency at page 721:

> " . . . a Defendant can be found incompetent to stand trial without being mentally ill. United States v. Adams, 297 F Supp. 596 (S.D.N.Y. 1969). Competence to stand trial is not solely a medical concept. The inquiry is not whether Defendant is sick, but whether he can understand the charges against him and cooperate with his attorney in making his defense. It is for this reason that the psychiatric

evaluations serve only as recommendations in making the final judgment."

If one does not have the emotional stamina to withstand a jury trial, then it is submitted that this is indicative of incompetency.

Certainly, where an attorney has advised her client that she could not stand up to the ordeal of taking the witness stand emotionally, it is clear that the attorney should have serious reservations as to competency.

If one, because of an emotional instability, cannot take the witness stand, then it is submitted that the individual is not properly able to aid in his defense.

The burden of proving that the defendant is competent to stand trial is on the Government which must prove its contention by a preponderance of the evidence, *United States ex rel. Bornholdt v. Ternullo,* 402 F Supp. 374, 377 (S.D.N.Y. 1975).

In a post verdict proceeding conducted on July 16, 1981, all of the factors relating to the Petitioner's competency were made known to the trial court through the filing of the Motion dated June 10, 1981. Yet in spite of all of the factors raised, the Court, in an abuse of discretion, refused to grant an evidentiary hearing. Certainly, if the Court held an evidentiary hearing, the issues raised in this appeal could have been clearly discussed and facts developed pertinent to this appeal, see *United States v. Disston,* C.A. 7th 1978, 582 F 2d 1108. See also *United States v. Constanza,* C.A. N.J. 1980 625 F 2d 465, and *Smith v. United States,* C.A. Mo. 1980 618 F 2d 507 in regard to propriety of the evidentiary hearing.

In further support on the competency issue, it is submitted that the Petitioner had a history of treatment for psychological disorders.

As is pointed out in Point III the close proximity of the suicide attempt was compelling reason to suspect

whether a few days later, the Petitioner could be competent to stand trial. Certainly, the better procedure would have been to adjourn the matter so as to keep the Petitioner under observation for a period of time. This would ensure the likelihood that trial would not commence with a Petitioner who was suicidal and not capable of aiding in her own defense. Of course counsel, for the reasons that go beyond rationality, wanted to press forward with the trial.

It is submitted that even without an evidentiary hearing, it is clear that an incompetent Petitioner was convicted by the Court in violation of her Sixth Amendment rights.

III

THE PETITIONER COULD NOT KNOWINGLY OR INTELLIGENTLY HAVE WAIVED A JURY TRIAL IN VIEW OF HER MENTAL CONDITION AND CIRCUMSTANCES IN DEPRIVATION OF HER SIXTH AMENDMENT RIGHTS

On July 15, 1980, prior to the commencement of trial, the Petitioner waived a jury and a trial without a jury was commenced.

A competency hearing was held on this particular July 15th date. The hearing was necessitated by the fact that on July 11, 1980, the Petitioner was taken to St. Vincent's Hospital because of an attempt to take her own life.

In view of the close proximity in time of the suicide attempt and the waivor of the jury trial, the intelligence of such a waivor was in grave doubt and the Court should not have put the case over until the Petitioner was in a more stable state of mind.

In *Patton v. United States,* 281 U.S. 279, 50 Sct. 253, 74 L.Ed. 854, the Court stated that a waiver of jury trial in a criminal case must have, in addition to the consent of the

Defendant, the express and intelligent consent of the Defendant, and the duty of the trial court in this regard is to be discharged with a sound and advised discretion. See also *Singer v. United States,* 380 U.S. 24, 85 Sct. 783, 13 L.Ed. 2d 630, 1965 in this regard.

In *Edwards v. Sasser,* 462 F Supp. 374, the Court, in striking down a so-called waivor of jury stated the following at page 378:

> "Trial by jury in criminal cases is fundamental to the American scheme of justice . . . " Duncan v. Louisiana, 391 U.S. 145, 149 88 Sct. 1444, 1447 20 L.Ed. 2d 491 (1968). The duty of a trial court to insure that any waiver of this fundamental right is the intelligent act of the Defendant himself . . . " is not to be discharged as a mere matter of rote." A judge may not "assume" that an attorney who waives a jury necessarily voices the wishes of his client."

In view of the attack on the competence of the Petitioner's trial lawyer, the above statement even becomes more compelling in that we have a suicidal Petitioner who was plainly being advised by an attorney whose competence left a great deal to be desired.

The right to have a jury trial is a fundamental right and a waivor should not be presumed, *United States v. Lee,* 539 F 2d 606, 609 (6th Cir. 1976).

On July 15, trial counsel made the following statement to the Court in regard to the waiver of jury trial and the petitioner's state of mind as related by the defense psychiatrist:

> "In his estimate, she is extremely nervous because she has to stand trial. The best thing for her is to get it over with as soon as possible. I have spoken with her and I have spoken with him about a number of aspects of the case and as a result of their opinions she is competent. As a result of

these discussions I assume that she would be found competent this morning in which event she would not like to have a trial by jury proceed tomorrow morning, but would rather have a trial before your Honor . . . "

Dr. Abramson, the Government's psychiatrist spoke about the Defendant's suicidal possibilities after his examination of her at the July 15, 1980 proceedings:

"I do believe what really plays on her mind is this matter which is before the Court here. If this can be taken care of I think her suicidal possibilities might be greatly diminished."

Earlier in the proceeding the Doctor made the following observations:

"She told me that she took 10 tablets of 5 milligram Valiums and half a bottle of vodka. Now it's not very good for the patient. Certainly, it isn't deadly in any way, the Valium.

Nevertheless, she tried to do away with herself because she wanted to sleep. She had been under a great deal of stress and strain because of the trouble she had been in.

My feeling was that the best therapy for her would be to try to settle the case, whatever happened."

Dr. Brownstein, the Petitioner's psychiatrist, testified to the following:

"So it is my medical opinion that it would be in the Defendant's best interest to proceed with trial as quickly as possible, and to have it in effect, absolutely terminated. I believe that she will feel a great lessening of psychological discomfort with respect to any attempted suicide."

It would seem that the proceeding which was held was more a forum to discuss how to prevent the Petitioner

from making any other attempt to commit suicide rather than to really probe into the Petitioner's state of mind as far as waiving a jury was concerned. Defense counsel asked more questions in regard to the Petitioner's safety at the proceeding than questions having to do with the intelligent waivor.

Judge Neaher asked a series of questions pertaining to the jury waivor of the Petitioner.

Dr. Brownstein was asked by the Judge if the Petitioner was competent to waive a jury. The Doctor testified that the Petitioner understood the import of such waivor.

The overwhelming impression that is created from an inspection of the proceeding is that the consideration which was given not to scrutinize what was best for the Petitioner legally, but what was best for her mentally and emotionally. It would seem that the Petitioner was not strong enough to have a jury trial and to withstand that type of proceeding.

The Petitioner should have been asked if she both emotionally and mentally would have withstood the vigors of a jury trial, so that at least she would have had a choice. It is submitted that the personal interrogation of the Petitioner by the trial judge was inadequate. See *United States v. Kidding,* 560 F 2d 1303 (7th Cir. 1977), *United States v Scott,* 583 F 2d 362 (1978). *Estrada v. United States,* 457 F 2d 255, 257 (7th Cir. 1972).

In *United States v. David,* 511 F 2d 355 at page 360 the Court made the following observations:

> "As with other constitutional rights, a waiver of the right to trial by jury should be accepted by a trial judge only after fulfilling the serious and weighty responsibility . . . of determining whether there is an intelligent and competent waiver by the accused."

The Court, in *David,* goes on to say at page 361 that questioning by the Trial Court is crucial where circumstances cast doubt on the validity of a given waiver. Certainly in the case for consideration, the suicide attempt must weigh heavily as a factor.

In *United States v. Mitchell,* 427 F 2d 1280 (3rd Cir. CA) the Court stated at page 1282:

> 'We do believe that it is better practice for a district judge when advised by a Defendant that he desires to waive his right to a jury trial, to interrogate the Defendant so as to satisfy himself that the defendant is fully apprised of his rights and freely and voluntarily desires to relinquish them."

In a motion dated June 10, 1981, to set aside the verdict or in the alternative re-open the trial, the Petitioner, through her new counsel made certain assertions. She stated that she took two Valium on the date she was asked to waive a jury trial. The record is devoid of any questioning of the Petitioner in this regard. Ms. Helgesen also asserted, through counsel, that she was too upset to face a jury trial. Her attorney talked her into waiving a jury trial. The defense attorney never discussed the waiver of the jury trial other than to recommend that it be done.

On July 16, 1981, the June 10, 1981 Motion was denied by the Court which even refused to hold a hearing as to the serious assertions raised in the Motion. A hearing would have been an invaluable tool to ascertain whether the Petitioner knowingly and intelligently waived her right to a jury trial. Trial counsel could have been confronted with the serious accusation made against her and could have been cross-examined as to the way she handled the defense of this matter.

Article III, Sec. 2 Cl. 3 of the United States Constitution guarantees that the trial of all crimes except in the

cases of Impeachment, shall be by jury. The Sixth Amendment of the Constitution provides in part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed."

In *United States v. Grasso,* 468 Fed Supp. 264, Aff. 612 F 2d 575, the Court wrote about this vital Sixth Amendment right at page 270:

> "Nothing said today should be taken to suggest that the Sixth Amendment right to trial by jury is a minor sphere in our constitutional galaxy. It is not nor should this decision be read as intimating that the procedural requirements of Rule 23 (a) are expendable."

The Petitioner, by virtue of all of the circumstances of the waiver was deprived of the most fundamental right of a trial by her peers. Because of this factor the conviction should be set aside.

CONCLUSION

For the reasons stated, we respectfully pray that a writ of certiorari to review the judgment of the United States Court of Appeals be granted.

Dated: New York, New York
March 5, 1982

Respectfully submitted,

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BARRY W. AGULNICK
Of Counsel

Appendix

APPENDIX "A"
OPINION OF COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 577—August Term, 1981
(Submitted: January 7, 1981 Decided: January 14, 1982)
Docket No. 81-1379

UNITED STATES OF AMERICA,

Appellee,

-against-

VALERIE HELGESEN,

Defendant-Appellant.

Before:
MOORE, KAUFMAN, and VAN GRAAFEILAND,
Circuit Judges.

Appeal from a judgment of the United States District Court for the Eastern District of New York (Edward R. Neaher, *Judge*), convicting Helgesen of Sixteen counts of the fraudulent use of credit cards in violation of 15 U.S.C. §1644(a), and seven counts of bank fraud in violation of 18 U.S.C.§1014.

Judgment affirmed. Case remanded to correct the

sentence on Counts 18 through 24 charging bank fraud in violation of 18 U.S.C. §1014.

BARRY W. AGULNICK, New York, New York (Agulnick & Gogel, New York, New York, of counsel), *for Defendant-Appellant.*

RUTH A. NORDENBROOK, Assistant United States Attorney for the Eastern District of New York, Brooklyn, New York (Edward R. Korman, United States Attorney for the Eastern District of New York, Jane Simkin Smith, Assistant United States Attorney for the Eastern District of New York, of counsel), *for Appellee.*

KAUFMAN, *Circuit Judge:*

This is an appeal from a judgment of conviction entered in the United States District Court for the Eastern District of New York after a bench trial before Judge Edward R. Neaher. Valerie Helgesen was convicted of sixteen counts of the fraudulent use of credit cards, in violation of 15 U.S.C. §1644(a), and seven counts of bank fraud, in violation of 18 U.S.C. §1014, all counts arising from a short-lived but highly remunerative fraudulent scheme conducted from a small boutique in Brooklyn, New York. Judge Neaher sentenced Helgesen to concurrent terms of imprisonment of three years on each count. Pursuant to 18 U.S.C. §3651, the trial court sentenced her to serve six months with the balance of the term of imprisonment suspended on each count, and concurrent five-year periods of probation to follow. On appeal, Helgesen raises several claims of error, the most serious of which is that she was denied the effective assistance of counsel. We determine that these claims are without merit, and, accor-

dingly, affirm the judgment of conviction. We remand to the district court, however, to correct the sentence on the seven counts of bank fraud in violation of 18 U.S.C. §1014, which carries a maximum authorized sentence of two years' imprisonment.

I.

The facts may be briefly recounted. In November, 1978, Valerie Helgesen and a friend, Jane Blangiardo, opened the Brooklyn Heights Home Boutique, a retail decorating business, in Brooklyn, New York. The Boutique's inventory consisted mainly of paint and related supplies such as brushes and rollers, and had a wholesale value ranging between one thousand and four thousand dollars. The Boutique was a relatively small store, approximately 20 feet by 40 feet.

Helgesen and Blangiardo opened a business checking account with a branch of Citibank, a subsidiary of Citicorp, in Brooklyn. Helgesen and Blangiardo were the only persons authorized to write checks on this checking account. In January, 1979, the two women applied to Citicorp Sales Management Systems for a merchant's credit card account which would allow them to accept VISA and Master Charge cards in making sales at the Boutique. Their application was accepted. The contract governing their merchant's credit card account permitted the two women to make direct deposits of credit card slips to the Boutique's checking account at a local Citibank branch. The funds generated by credit card sales could then be withdrawn by check on the following business day.

Helgesen and Blangiardo jointly owned and operated the Boutique until July 30, 1979, when Blangiardo terminated her association because of business and personal differences with Helgesen. Helgesen continued to operate the store alone. During the first seven months of 1979,

when Blangiardo was involved in running the store, credit card sales ranged between $500.00 and $1500.00 per month. Between August 17, 1979, and September 24, 1979, credit card sales slips totalling more than $220,000.00 were deposited in the Boutique's checking account, and the funds thus generated were withdrawn by check. While Helgesen was at times accompanied by a man identified as Adeeb "Eddie" Asaad when making these transactions, all of the checks withdrawing these funds were signed by Helgesen, and many of the checks were certified by Citibank at her request. All but three of the more than three thousand slips deposited were fraudulent, created with lost or stolen credit cards, and falsely signed with the cardholders' names.

In January, 1980, the grand jury returned a 24-count indictment against Helgesen for her participation in these fraudulent activities. Counts One through Seventeen charged her with using seventeen specifically identified lost or stolen VISA or Master Charge credit cards to generate more than $1,000 on each card, in violation of 15 U.S.C. §1644(a). Counts Eighteen through Twenty-four charged Helgesen with bank fraud in violation of 18 U.S.C. §1014, arising from her deposit of fraudulent credit card invoices which reflected "sales" made with lost or stolen credit cards, to her merchant's credit card account with Citibank.

On July 13, 1980, prior to trial, Judge Neaher held a hearing to determine whether Helgesen was competent to stand trial. This hearing was initiated after the court was apprised that Helgesen had attempted suicide. Two psychiatrists, one selected by the defense and the other by the Government, testified that she was competent to stand trial. The trial court agreed. Helgesen then waived her right to a jury trial, after extensive questioning by Judge Neaher. Bench trial commenced on July 15. After hearing testimonny and receiving closing memoranda from both

sides, the judge delivered a verdict convicting Helgesen of Counts One through Seven and Counts Nine through Seventeen,[1] charging fraudulent use of credit cards in violation of 15 U.S.C. §1644(a), and of Counnts Seventeen through Twenty-four, charging bank fraud in violation of 18 U.S.C. §1014. In June, 1981, Helgesen moved for a new trial, asserting, inter alia, that her waiver of her right to a jury trial was defective because she had ingested two Valium tablets prior to the hearing. Judge Neaher denied this motion. The court imposed the sentence noted above.

On appeal Helgesen, represented by a different attorney, alleges that she did not receive effective assistance of counsel at trial, that she was not competent to stand trial, and that her waiver of jury trial was not knowingly and intelligently made.

II.

A. Ineffective Assistance of Counsel

Helgesen asserts that the representation rendered by her trial counsel, Suzanne Antippas, was so incompetent and ineffective that it resulted in a trial which was a "farce and mockery of justice," the standard governing ineffective assistance of counsel claims in this Circuit. *See United States v. Aulet,* 618 F.2d 182, 187 (2d Cir. 1980); *Indiviglio v. United States,* 612 F.2d 624 (2d Cir. 1979). Helgesen asserts that her trial was a "farce and mockery" because her attorney: (1) spent too much time cross-examining non-essential witnesses about their credibility; (2) failed to focus on the issue of Helgesen's state of mind and intent; (3) did not make an opening statement or a closing oral argument; (4) did not call several witnesses, including Helgesen; and (5) failed to request a pretrial hearing on the propriety of the pre-indictment

photographic identification procedures used. Moreover, Helgesen invites this Court to reject the "farce and mockery" standard and adopt the "reasonable competence" standard followed by several other circuits. *See generally* Note, *Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After United States v. Decoster,* 93 Harv. L. Rev. 752, 757 & n. 36 (1980). On the facts of this case we would reach the same conclusion—that Helgesen was not denied the effective assistance of counsel—under either standard.

An evaluation of ineffective assistance of counsel claims usually begins with an examination of the strength of the Government's case. *United States v. Aulet,* 618 F.2d 182, 188 (2d Cir. 1980); *United States v. Bubar,* 567 F.2d 192, 202 (2d Cir.), *cert. denied,* 434 U.S. 872 (1977). In this case, the evidence of Helgesen's guilt is overwhelming. Thirteen holders of credit cards used to produce the fraudulent credit card slips testified that they never made any purchases at the Brooklyn Heights Home Boutique and that their credit cards were lost or stolen. While credit card sales varied between $500.00 and $1500.00 per month during the first seven months of 1979, credit card sales slips representing approximately $220,000.00 in sales were deposited in the Boutique's checking account by Helgesen during a thirty-five day period. All the credit card slips deposited in the account were in amounts only slightly less than the retail floor limit for the card. Furthermore, several tellers from the Brooklyn Heights Citibank identified Helgesen as the person whoc onducted the transactions. Finally, a former employee of the Boutique, Consuela DiCiara, testified about the receipt of telephone calls concerning the improper use of credit cards and the limited number of credit card sales during the period of her employment from September 11, 1979, through September 21, 1979. As a result, the evidence of

Helgesen's active and knowing partaicipation in the fraudulent scheme was simply overwhelming.

Moreover, in general, Helgesen's claims of ineffective assistance involve her attorney's exercise of professional judgment in planning a trial strategy rather than omissions that could, under some circumstances, lay the basis for an ineffective assistance claim. *United States v. Aulet, supra,* at 189. We have often noted our reluctance to second-guess matters of trial strategy simply because the chosen strategy has failed. *Id.* Trial advocacy is an art, and the advocate must be given some latitude in deciding upon an appropriate trial strategy. *See* Note, *supra,* at 766. Trial counsel's cross-examination of the tellers and other witnesses was directed toward showing that Adeeb "Eddie" Asaad had deceived and intimidated Helgesen, and did not simply amount to cross-examination of "non-essential" witnesses, as Helgesen claims. Trial counsel's decision not to call Helgesen or her mother or sister as witnesses was a matter of professional judgment that their testimony would be irrelevant or possibly harmful. Furthermore, since Helgesen waived her right to a jury trial, defense counsel's use of a closing memorandum rather than oral summation could not have been prejudicial.

Finally, trial counsel's failure to request a pre-trial hearing on the pre-indictment photographic identification procedure does not provide a basis for relief since such failure did not cause Helgesen any prejudice. *United States v. Daniels,* 558 F.2d 122, 126 (2d Cir. 1977). Trial counsel examined the postal inspectors extensively on the method for selecting the three photographic arrays which were prepared and displayed, and cross-examined the inspectors and some of the tellers on the details of the identifications. Not only has Helgesen failed to suggest any basis for questioning the propriety of the identification procedure, but the identification of appellant has not been a material issue in the case. Accordingly, Helgesen's claim

that her trial counsel's performance was so ineffective that it rendered the proceedings constitutionally defective is without merit.

B. Competence to Stand Trial

Helgesen claims that Judge Neaher erred in concluding that she was competent to stand trial, asserting that prior to the competency hearing she ingested two Valium tablets. Apart from Helgesen's suicide attempt, Judge Neaher was not presented with any evidence that indicated Helgesen was incompetent to stand trial. Two psychiatrists, as we have noted, one selected by the defense and the other by the Government, testified at the competency hearing that appellant was competent to stand trial, that she understood the nature of the charges against her and could assist in her own defense. *See United States v. Mercado,* 469 F.2d 1148, 1152 (2d Cir. 1972). Even if appellant ingested Valium prior to the competency hearing, it does not follow that this, *ipso facto,* rendered her incompetent to stand trial. *United States ex. rel. Fitzgerald v. LaValle,* 461 F.2d 601 (2d Cir. 1972). The Government's case took nearly two weeks to present, and during this time, the court did not observe evidence of any physical or emotional problems impairing appellant's ability to assist in her own defense. Accordingly, we conclude that the trial court did not err in finding Helgesen competent to stand trial at the pre-trial hearing, or in denying a hearing or a new trial on competency grounds.

C. Waiver of Right to Jury Trial

Helgesen claims that her waiver of her right to a jury trial was not knowingly and intelligently made because it was based on psychological rather than legal considerations. Helgesen cites no authority for the proposition that

a waiver of jury trial to avoid the stress of an appearance before a jury may not have been the decision of an informed and competent defendant. The trial court informed appellant that she had a right to a jury trial, and attempted to explain how waiver of a jury trial would be advantageous or disadvantageous. In light of the trial court's meticulous examination of Helgesen, the court did not err in concluding that she was competent to waive a jury trial and that she knowingly and intelligently waived that right. *Singer v. United States,* 380 U.S. 24 (1965).

Since Helgesen's claims are without merit, we affirm the judgment of conviction entered by Judge Neaher.

III.

The trial court sentenced Helgesen to concurrent terms of imprisonment of three years on Counts Eighteen through Twenty-four, charging bank fraud in violation of 18 U.S.C. §1014, as well as on sixteen counts charging the fraudulent use of credit cards in violation of 15 U.S.C. §1644(a). The Government correctly notes that the maximum authorized sentence for a violation of 18 U.S.C. §1014 is two years. Accordingly, while we affirm the judgment of conviction, we remand to the district court to correct the sentence on Counts Eighteen through Twenty-four charging bank fraud in violation of 18 U.S.C. §1014.

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1. Helgesen was acquitted of the charge of fraudulent use of credit cards in violation of 15 U.S.C. §1644(a) alleged in Count 8 on the ground that there was insufficient evidence that the credit card in question was lost, stolen or fraudulently obtained.

APPENDIX B
TRIAL DECISION OF JUDGE NEAHER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

VALERIE HELGESEN,

Defendant.

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80 CR 9(S)

MEMORANDUM OF DECISION

APPEARANCES:
EDWARD R. KORMAN, ESQ.
United States Attorney,
Eastern District of New York
By RUTH A. NORDENBROOK, ESQ.
Assistant U.S. Attorney

SUZANNE ANTIPPAS, ESQ.
Attorney for Defendant

NEAHER, District Judge.

This case arises out of a 24-count indictment charging the defendant, Valerie Helgesen, with the knowing use of lost, stolen or fraudulently obtained credit cards to obtain substantial sums of money from Citibank, N.A., in violation of 15 U.S.C. §1644(a), and with making false statements to that bank, which is federally insured, for the

purpose of influencing its action with respect to her merchant's credit card account, in violation of 18 U.S.C. §1014.[1] With the approval of the Court and the consent of the government, Rule 23(a), F.R.Cr.P., defendant signed a waiver of her right to a trial by jury. After hearing the government's evidence, and that offered by the defendant, the Court finds the defendant guilty as charged on all counts except count 8. The following constitute the Court's special findings of fact and conclusions of law. Rule 23(c), F.R.Cr.P.

FINDINGS OF FACT

In November 1978, defendant and Jane Blangiardo opened a retail decorating business called the Brooklyn Heights Home Boutique, Ltd. ("HHB") at 216 Hicks Street in Brooklyn, New York. Defendant was the president and treasurer of the corporation and Blangiardo was its vice-president and secretary.

Just prior to their establishment of the business, defendant and Blangiardo opened a business checking account for HHB with Citibank, N.A., at a branch located on Montague Street in Brooklyn. Citibank's deposits are insured by the Federal Deposit Insurance Corporation ("FDIC").

In January 1979, defendant and Blangiardo applied to Citibank Sales Management Systems ("CSMS") for a merchant's credit card account which would allow them as proprietors of HHB to accept MasterCharge and VISA cards in making sales to customers. CSMS, like Citibank, is a subsidiary of Citicorp and is authorized to act for the latter in connection with credit card transactions. Although the contract opening a credit card account is entered into between the merchant and CSMS acting for Citicorp, the signatory for the latter is another subsidiary called Citicorp Credit Services, Inc. ("CCSI").

HHB's inventory consisted mainly of paint and related supplies such as brushes and rollers having a wholesale value ranging between $1,000 and $4,000. Other decorating items, such as wallpaper, curtains, blinds and shades were not kept in inventory but had to be ordered specially pursuant to a customer's selection from catalogues kept by HHB. The dimensions of HHB's store premises were approximately 20 feet by 40 feet. The business had incurred debts in starting up and, because of difficulties in developing a regular sales clientele, Blangiardo and defendant never "quite brought it above water."

Although the agreement opening the HHB credit card account provided for deposits to be made through the mail, direct deposits to a Citibank branch were accepted and credited to the account as cash deposits on the following business day. Prior to August 1979, HHB credit card sales invoices were deposited by mail, using pre-addressed envelopes provided at the time the merchant's credit card account was opened.

During the first seven months of 1979 the following monthly deposits of credit card sales invoices were made at Citibank:

January	$1,008.66
February	$805.13
March	$593.57
April	$1,174.16
May	$1,318.50
June	$1,485.96
July	$532.41

These deposits reflected the volume of credit card sales normally experienced by HHB from January through July, 1979.

Defendant and Blangiardo jointly owned and operated HHB until, due to business and personal differences, they agreed that after July 30, 1979, defendant would operate the store alone. Except for the completion of a single decorating commitment, Blangiardo engaged in no activities relating to HHB's business after July 30, 1979.

Consuelo DiCiera was employed as an assistant in HHB from September 11, 1979, through September 21, 1979, when the store terminated operations. Her work schedule was irregular since defendant would tell her each day what hours she was to work the following day; but HHB was usually open for business Tuesdays through Fridays and on some Saturdays. DiCiera estimated that defendant was at the store 35% of the time. While at the store, DiCiera received two telephone calls, one a complaint about the repeated and unauthorized use of a stolen credit card, and the second from an employee of VISA inquiring about the use of the store's charge card plates. DiCiera reported both calls to the defendant, who said that she would take care of them.

During the time she worked at HHB, DiCiera took in an approximate total of only $30, since there were not many customers, and none involving credit card sales. She observed only one credit card transaction, which defendant handled.

Between August 17 and September 21, 1979, however, on almost every banking day, batches of HHB credit card sales invoices were submitted by direct deposit to the HHB account at Citibank. Citibank investigator Peter Jacina identified Government Exhibits 10 through 20, 51 through 67, 114, 129 and 174 as bank copies of credit card sales invoices retrieved from the regularly maintained archives of Citibank relating to the HHB account. In all, Citibank records reflected that 45 batches were deposited at the Montague Street branch representing

a total face value of $221,384.34. More particularly, with regard to counts 18 through 24 of the indictment, Government Exhibits 10 through 20 establish that on the days noted below batches of invoices totaling the following face amounts were deposited:

Date	*Total face value of invoices*
August 20, 1979	$7,032.18
August 30, 1979	$5,758.00
September 4, 1979	$10,083.66
September 6, 1979	$7,932.89
September 7, 1979	$9,114.43
September 10, 1979	$14,108.16
September 11, 1979	$10,173.13

During this period also, funds were being regularly withdrawn, and on October 11, 1979, the balance of the HHB account was at zero. Most, if not all, of the credits generated by the deposits of the sales invoices were withdrawn by means of HHB checks, which had been written in whole or in part by defendant and presented to the bank for certification or for cashing.

Thomas Donovan, Director of the United States Postal Service Crime Laboratory and an expert questioned documents examiner, identified the handwriting which appeared on 29 HHB checks totaling $117,435.28 as that of defendant either as maker or endorser, or both. This handwriting testimony was corroborated by Blangiardo, who had seen defendant sign her name hundreds of times in the past three years.

Defendant was also identified by four Citibank tellers as the individual associated with the presentation for certification or cashing of an additional group of checks totaling $54,363.09. As already noted, defendant and Blangiardo were the only authorized makers of checks

drawn on the HHB account at Citibank; and since Blangiardo had terminated her active participation in HHB on July 30, 1979, there were no checks bearing her signature after that date. Moreover, none of the Citibank tellers who testified identified Blangiardo as a person they associated in any way with the HHB account.

In signing the agreement of January 2, 1979, which established the HHB merchant's credit card account at Citibank, defendant, as "Seller" of credit card sales invoices, termed "items of indebtedness," represented and warranted to the bank

> "[that] such Indebtedness represents a valid obligation of a Cardholder;
>
> "[that] the transaction out of which such Indebtedness arose was in all respects a legal purchase of goods or services by a Cardholder. . . ."

In addition, each "sales/credit summary," the bank form accompanying and totalling each batch of credit card sales invoices deposited, expressly incorporated the representations and warranties contained in the January 2, 1979 agreement.[2]

The sales/credit summaries accompanying deposits to the HHB account made on August 20 and 30 and September 4, 6, 7, 10 and 11, 1979—the deposits underlying counts 18-24 of the indictment—bear the imprint of the HHB name and account number. The summaries accompanying the deposits underlying counts 10 through 15 also bear defendant's name on the line identifying it as "Seller's Signature." Also, Government Exhibit 115 contains summaries which accompanied deposits to the HHB account on 12 separate days between August 17 and September 14, 1979.

Donovan, the Postal Service handwriting analyst, identified the "Valerie Helgesen" signatures appearing on

sales/credit summaries of HHB as those of defendant. These summaries accompanied batches of sales invoices for deposits made to the HHB account at Citibank on August 17, 20, 21, 22, 27, 29 and 31, 1979, and September 4 and 13, 1979. Inspector Donovan's identification is supported by the Court's own comparison of those signatures with unquestioned signatures of defendant on Government Exhibits 119, 120 and 121 (reproduced as Government Exhibit 203).[3]

Four Citibank tellers who had handled banking transactions with defendant identified her as the principal person who made deposits of batches of credit card sales invoices to the HHB account in August and September, 1979. Although defendant was accompanied at times by a man identified as Adeeb "Eddie" Asaad, it was she who obtained during that same time period certified checks in amounts ranging up to $18,100 drawn on the HHB account and endorsed them for cashing. Also, when asked by the tellers why so many large checks were being cashed, it was defendant who explained that cash was needed for various business purposes and to pay customers who would not accept checks. The Court finds that defendant knowingly made this series of deposits and withdrew the cash generated by these credits.

VISA-USA, based in San Francisco, California, and Interbank, New York City, provide credit card security and informational services relating to the use of VISA and MasterCharge cards issued by member banks. This includes the compilation and regular updating of computer files of credit card numbers and maintenance of "status code" files indicating credit cards whose use is restricted because of a report from the issuing bank advising of fraud, loss, theft or other reason.

So-called "hot card" bulletins are periodically compiled from the computer files. These are newsprint lists of restricted cards, called the Card Recovery Bulletin for

VISA and the Restricted Card List for MasterCharge, that are updated and sent to merchants on a weekly or biweekly basis. Separate bulletins are printed for different regions of the United States—six in the case of VISA and nine for MasterCharge—and the issuing bank informs VISA and Interbank as to whether a certain restricted credit card number is to be listed on one, some or all of the regional bulletins. a restricted credit card number is initially listed for a period of 30, 60 or 90 days, which may be extended on request of the issuing bank. If a merchant is tendered a credit card listed as restricted, or if for any reason he suspects an irregularity, it is his responsibility to telephone VISA or Interbank personnel, who will check the card number against their computer files and direct the merchant to "pick up," or retain, the card if it is restricted.[4]

A merchant's "floor limit" is the maximum value of a credit card sale he may make without prior telephone authorization from VISA, Interbank or the issuing bank. The floor limits for HHB were $75.00 for MasterCharge sales and $50.00 for sales made on VISA cards. Merchants with Citibank credit card accounts are also instructed to check the hot card bulletins for all cards presented to them, whether the pruchases are above or below the applicable floor limit.

CSMS, on behalf of Citicorp banks, routinely instructs merchants regarding the amount and significance of the assigned floor limits and their responsibility to check the hot card bulletins. Neither Blangiardo nor defendant, whose signature as HHB president appears on the account information sheet and the agreement establishing the HHB account, questioned the information they were given at the time the credit card amount was opened. According to Blangiardo, their practice had been to confirm by telephone credit card sales above $25.00.

From January through July of 1979 the weekly average credit card sale at HHB, as computed by Citibank

and appearing on weekly statements sent to the store, varied widely. In some weeks there were no VISA or MasterCharge sales. For the weeks when credit card sales were made, the average sale ranged from $7.86 to $162.00 for MasterCharge, and from $10.28 to $297.77 for VISA.

Of the 3,210 sales invoices imprinted with MasterCharge and VISA credit cards and deposited to the HHB account between August 11 and September 19, 1979, with the single exception of one that apparently represented a bona fide credit card transaction, all but 18 were completed for amounts approaching but just below the respective floor limits of $75 and $50. All except one of the 18 invoices were only slightly above the respective floor limits at HHB.[3] During the period in question, the weekly averages for credit card sale invoices deposited to the HHB account were as follows:

Week	Average MasterCharge Invoice	Average VISA Invoice
August 17-23	$71.89	$46.67
August 24-30	$73.60	$47.24
August 31-Sept. 6	$73.77	$48.59
September 7-13	$74.22	$49.27
September 14-20	$74.66	$49.12

On September 20, 1979, Inspector Jeffrey Fowler and other agents of the United States Postal Inspection Service executed a search warrant in premises at 2059 East 23rd Street, Brooklyn, New York ("the 23rd Street premises"). In the course of this search five fliptop cigarette boxes containing 121 credit cards were found concealed in the kitchen ceiling. Also found, under a mattress in a bedroom, were 300 credit card sales invoices of the same type as the invoices in Government Exhibits 10 through

20. These invoices had been pre-imprinted with the 121 concealed credit cards and bore signatures corresponding to the names on those cards.

Government Exhibit 170 is a summary of the 3,210 invoices deposited to the HHB account and contained in Exhibits 10-20, 51-67, 114, 129 and 174, which cumulatively total the sum of $177,744.84. Each of these invoices was either generated by a credit card that the issuing bank wanted recovered or by one of the 121 credit cards recovered in the search of the 23rd Street premises. In all, Government Exhibit 170 contains invoices created through the use of over 200 different credit cards. With the exception of two invoices erroneously included,[6] Government Exhibit 170 summarized all HHB credit card sales invoices retrieved from Citibank archives representing purported sales at HHB between August 11 and September 19, 1979.[7]

Dawn Tindal, of VISA-USA, checked against the VISA exception file a list of 167 names and credit card account numbers derived from the same Citibank records that were independently compiled into Government Exhibit 170 and found that for the period from mid-June through October 1979, 133 account numbers were on the exception file with a fraud code, indicating that the card had been reported lost or stolen; 27 had a code indicating that the issuing bank wanted the card recovered and was offering a reward for its return; one had a code indicating that inquiries to VISA were to be referred to the issuing bank; and six could not be found.

Donato Coppola, of Interbank, checked against Interbank's Restricted Card List a list of 103 names and credit card account numbers also derived from Citibank records relating to the HHB account. He found that 99 of those cards were on the restricted card list and the remaining four were determined to be either misprints or invalid numbers. Of the 99 restricted cards, 59 had fraud codes, 37 were coded "other" and three were coded "credit."

Based on this information supplied by VISA-USA and Interbank, which corroborated the determinations of Citibank Inspector Facina, United States Postal Inspector Jerry Klapper testified that in his experience this pattern indicated that the invoices contained in Government Exhibit 170 did not represent legitimate sales at HHB.

In sum, all but a statistically insignificant handful of credit card sales invoices retrieved from Citibank archives relating to the HHB account for the period August 11 through September 19, 1979 had been generated by cards that had been restricted by their issuing banks or had been recovered at the 23rd Street premises, or both. In addition, a comparison of the list of cards found at 23rd Street and the chronological list of HHB invoices reveals that most, and possibly all, of the invoices submitted to the HHB account at Citibank during the ten days prior to September 19 were generated by the credit cards found at the 23rd Street premises.

The following holders of VISA and/or MasterCharge credit cards testified at trial:

Count	Cardholder & Issuing Bank	Card Number*
2	William C. Jones Tulsa, Oklahoma (Bank of Oklahoma)	M/C No.51041012534741 V No. 4644060533
3	Beverly T. Maurice Houston, Texas (First National City Bank of Houston)	M/C No. 51051011338556
4	Edward Hernandez Glendale, California (United California Bank)	MC/ No. 51241106046004

5	Lawrence Nash Newport, Oregon (Newport Bank, Newport, Oregon)	M/C NO. 51245791001026
6	Fern F. Gaumer Oberlin, Kansas (Commerce Bank, Kansas City, Mo.)	M/C No. 51524211070422
7	Beverly S. Sloane Claremont, California (Security Pacific Bank)	M/C No. 52040138085223
9	Frieda Foster Florence, South Carolina (Guarantee Bank & Trust Company)	M/C No. 52282701047608
11	John J. Lawlor Stamford, Connec- ticut (Rockland Trust Company, Rockland, Mass.)	M/C No. 520774504393084
12	Michael P. O'Con- nor Ann Arbor, Michigan (Michigan Bank)	M/C No. 5411690555590017 V No. 4460155590013
13	Mrs. Dennis V. Carlson Minneapolis, Min- nesota (issuing bank not iden- tified)	M/C No. 521185771313

14	Hasia Moreno Holon, Israel (Bank Leumi, Israel)	V No. 4580000200012243
15	Frederick R. Brodzinski New York, N.Y. (Maryland National Bank)	M/C NO. 53290908600885
16	Myra P. Sadker Bethesda, Maryland (Maryland National Bank)	M/C No. 53290571100650 V No. 4337150238436

In sum, the listed credit cards were either lost or stolen from the holders prior to or during September 1979, while the latter were visiting New York City, and most of these cards were recovered in the search of the 23rd Street premises. None of the holders or their spouses had ever heard of HHB or used the cards to make purchases from HHB. Upon examination of numerous credit card sales invoices imprinted by the cards and included in deposits to HHB's account at Citibank during August and September 1979, each cardholder declared that the purchaser's signature appearing thereon was not his signature. Finally, these cardholders also testified that they had received notices of charges to their credit card accounts for purchases that they had not made. The Court finds that their testimony was credible in all respects beyond a reasonable doubt.

In summary, the Court finds that each of these 13 credit cards was lost, stolen or fraudulently obtained at the time it was used to generate the invoices deposited to the HHB account at Citibank. The evidence establishes beyond a reasonable doubt that the cards in counts 2, 3, 4, 5, 7, 9, 11, 12 and 14 were recovered at the 23rd Street premises hidden

among more than 100 cards apparently being used to imprint numerous credit card sales slips of the same type as those deposited to the HHB account. The cardholder testimony concerning the disappearance of the cards in counts 2, 3, 4, 5, 6, 7, 9, 11, 12, 13, 14, 15 and 16 removed any possible doubt that those cards had in fact been lost, stolen or fraudulently obtained.

Regarding counts 1, 10 and 17, documentary evidence provided information with respect to the following credit cards:

Count	*Cardholder & Issuing Bank*	*Card Number*
1	Marga Bock (Eurocard Deutschland, Frankfurt, Germany)	M/C#5232116034707
10	Mary Jo Deli Chicago, Illinois (Northern Trust Bank, Chicago, Illinois)	M/C#518322050045791
17	Pamela A. Stokes (Wells Fargo Bank, San Francisco, California)	M/C#51262031093531

Although these three cardholders did not testify, records were placed in evidence showing that the Stokes card had been taken from its owner and reported stolen on July 6, 1979, and that on August 15, 1979, the Deli card had been reported lost or stolen. Mr. and Mrs. Deli declared in affidavits that they had not made any of the dozens of HHB purchases apparently effected through the use of their card. Additionally, the Bock and Deli cards were recovered in the search of the 23rd Street premises on September 20, 1979. The credit card processing organizations responsible for these three cards gave each a "fraud"

status. This evidence of loss or theft, moreover, was corroborated by the independent evidence of the unvaried pattern of use of these cards, which was identical to that of the other credit cards.

The Bock, Deli and Stokes cards were used within a short period in August and September, 1979, to generate multiple credit card invoices in amounts aggregating, respectively, $2,523.27, $2,292.26 and $1,770.10. This occurred when HHB typically stocked no more than $4,000 worth of merchandise and employee DiCiera witnessed only one credit card sale while she worked at the store. Thus it is highly improbable that any one of the named cardholders, who lived in distant places, came in off the street to make such a series of purchases. Invoices created through the use of these cards were deposited to the HHB account in each of the batches represented by Government Exhibits 10-20. Moreover, the coincidences that with one exception each of 90 purported sales on the Bock, Deli and Stokes cards was just below the card's floor limit at HHB, and that on each card more than one "sale" was made on some days, yet separate invoices were nonetheless generated—such that each invoice appeared to be for an amount just below the floor limit—demonstrates a pattern that Kathleen Blake, with 15 years experience as a credit card fraud investigator for the Bank of America, expressly identified as indicative of merchant, rather than cardholder, fraud.

The circumstances of this pattern, highly unusual in the light of daily experience and identical to that of the 13 cards discussed above, renders fanciful the suggestion that these three cards had been used by their legal owners to make 90 bona fide purchases at HHB within a period of weeks. The cumulative weight of these inferences and the direct evidence removes any reasonable doubt that the Bock, Deli and Stokes cards had been lost, stolen or fraudulently obtained by others prior to their use in rela-

tion to the HHB account at Citibank. *United States v. Elsbery,* 602 F.2d 1054, 1057 (2d Cir.), *cert. denied,* __U.S.__, 100 S.Ct. 529 (1980); *United States v. Lubrano,* 529 F.2d 633, 636 (2d Cir. 1975), *cert. denied,* 429 U.S. 818 (1976).

A different conclusion must be reached, however, with respect to the card described in count 8. The card itself, a MasterCharge card No. 52243000133515 issued in the name of "Subhash C. Hora," was not found nor did the cardholder testify at trial. Although the card was apparently used to create a number of HHB credit card sales invoices, which were deposited to the HHB Citibank account during late August and early September, 1979, there were no loss or theft reports or affidavits to establish how the card came to be listed as restricted. In the absence of any corroborating evidence, the single restricted card listing does not suffice to raise an inference beyond a reasonable doubt that the Subhash C. Hora card was lost, stolen or fraudulently obtained at the time of its use in connection with the HHB account. Accordingly, because of a failure of proof of this essential element, defendant is acquitted of the charge in count 8.

Finally, upon the evidence adduced at trial, the Court finds beyond a reasonable doubt that each of the batches of invoices in Government Exhibits 10-20, representing the deposits made to the HHB account on August 20 and 30, September 4, 6, 7, 10 and 11, 1979, which underlie the charges in counts 18 through 24, contained numerous invoices generated through the use of the 16 lost, stolen or fraudulently obtained credit cards discussed above.

CONCLUSIONS OF LAW

Turning first to counts 1 through 17 of the indictment, alleging violations of 15 U.S.C. §1644(a), the government had to prove as to each count the following essential elements beyond a reasonable doubt:

(1) the defendant's knowing use,

(2) in a transaction affecting interstate or foreign commerce,

(3) of a lost, stolen or fraudulently obtained credit card,

(4) to obtain more than $1,000.00 during a one-year period.

See *United States v. Lomax,* 598 F.2d 582 (10th Cir. 1979); *United States v. Kay,* 545 F.2d 491 (5th Cir.), *cert. denied,* 434 U.S. 833 (1977); *United States v. Mikelberg,* 517 F.2d 246 (5th Cir. 1975), *cert. denied,* 424 U.S. 909 (1976).

The evidence at trial established beyond a reasonable doubt that more than $1,000 per card was obtained within a one-year period from the use of the 16 credit cards identified in counts 1-7 and 9-17 of the indictment. During August and September, 1979, over 3,000 invoices were deposited and credited to the HHB account at Citibank and the proceeds withdrawn by defendant in the form of certified checks. As the Court has already found, each of these cards, with the exception of the one referred to in count 8, was lost, stolen or fraudulently obtained at the time they were used in relation to the HHB account at Citibank.

The submission of a series of invoices generated through the use of a credit card identified in the indictment demonstrates a common scheme or design and qualifies the conduct alleged in each count as a "transaction" for the purposes of 15 U.S.C. §1644(a). *United States v. Mikelberg, supra,* 517 F.2d at 250-52.

The element of "a transaction affecting interstate or foreign commerce" presents a mixed question of law and fact. See *United States v. DiFrancesco,* 604 F.2d 769, 775 (2d Cir. 1979), *rev'd on other grounds,* __ U.S. __, 101 S.Ct. 426 (1980). See also *United States v. Calder,* slip op.

1365, 1368 (2d Cir., February 10, 1981). Although the legislative history of 15 U.S.C. §1644 cannot be said to provide much guidance on this point, it has been observed that

> ". . . Congress, when considering Section 1644, was well aware of the credit card system in the United States and its problems, as well as the effect on interstate travel. The language of the statute demonstrates that Congress intended to use its broadest constitutional power to provide a useful tool for punishment of *any acts affecting interstate commerce* through the fraudulent use of credit cards. [Citation omitted.]" (Emphasis supplied.)

United States v. Lomax, supra, 598 F.2d at 584. Moreover, when Congress exercises its full constitutional power under the Commerce Clause, which has been described as "sweeping," it has been held that the effect on interstate commerce need be neither direct nor substantial. *United States v. Augello,* 451 F.2d 1167, 1169-70 (2d Cir. 1971), *cert. denied,* 405 U.S. 1071 (1972) (conviction under Hobbs Act, 18 U.S.C. §1951, upheld where effect on interstate commerce "merely potential or subtle"); *United States v. Tropiano,* 418 F.2d 1069, 1075 (2d Cir. 1969), *cert. denied,* 397 U.S. 1021 (1970) (under Hobbs Act transactions "need affect interstate commerce only in a minimal degree). Accord, *United States v. Daley,* 564 F.2d 645, 649 (2d Cir. 1977), *cert. denied,* 435 U.S. 933 (1978). See generally, *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241 (1964); *Katzenbach v. McClung,* 379 U.S. 294 (1964). Compare *United States v. Mennuti,* slip op. 1013 (2d Cir., January 9, 1981).

With these principles in mind, the Court concludes that each of the transactions alleged in counts 1 through 17, with the exception of count 8, affected interstate or foreign commerce.

Initially, judicial notice is taken of the commonly known fact that Citibank, *N.A.*—for "National Association"—is an FDIC-insured bank and, as one of the world's largest banking institutions, engages in interstate and foreign commerce. *United States v. Mauro,* 501 F.2d 45, 49-50 (2d Cir.), *cert. denied,* 419 U.S. 969 (1974). Fed. R. Evid. 201. Each of the credit cards referred to in counts 1-7, 10-12 and 14-17 was issued by a bank located outside New York State and, in two cases, by banks located outside the United States. In addition, each of the cardholders identified in counts 1-4, 6, 7, 9-14 and 16 resided in States other than New York or lived abroad. Under these circumstances, the submission of the invoices to Citibank in New York resulted either in charges against the cardholders' accounts at their banks outside New York, or in the non-resident cardholders' receipt of inflated credit card account statements or notices to that effect, or both. Finally, continued use of a credit card appearing on a restricted card list in large part determines whether the issuing bank will request that VISA or Interbank reinstate the card on the bulletin following the initial period of listing. It is clear from the evidence that the preparation and distribution of the restricted card lists affects interstate or foreign commerce.

Regarding the element of knowledge and defendant's intent, the Court concludes on the basis of the direct and circumstantial evidence that defendant knowingly violated 15 U.S.C. §1644(a) with regard to counts 1-7 and 9-17. The government was not required to show that defendant knew the specific details of how the credit cards were lost or stolen, nor precisely how those cards were used to imprint the invoices with the lost or stolen cards.[8] See *United States v. Alessi,* 638 F.2d 466, 475-76 (2d Cir. 1980); *United States v. Mikelberg, supra,* 517 F.2d at 253. Rather, the government had to establish that defendant knew that through the agency of others she was using lost

or stolen credit cards by knowingly submitting to the HHB account invoices that had been fraudulently created through the use of such cards and not through bona fide purchases of goods at her store.

At trial, the government was prepared to concede to defendant that, for various technical and logistical reasons, the credit card numbers in question had not appeared on the hot card bulletins sent to merchants in HHB's region at the time of the events at issue. However, it was argued that this circumstance supported an inference of guilty knowledge. The Court agrees.

Defendant knew that she would be required to report the discovery of a proffered credit card on a hot card bulletin. She also knew that she would have to receive telephone authorization to effect a sale in an amount above the HHB floor limits. Therefore, defendant knew that a merchant who accepted a credit card not appearing on a restricted card bulletin for a sale beneath the store's floor limit would appear to be in full compliance with appropriate procedures and not chargeable with a failure to detect and report the use of a lost or stolen credit card. Viewed in this light, the remarkable coincidence that nearly all of more than 3,000 credit card invoices deposited were for purported sales at HHB just below the applicable floor limits, and the sheer repetition of the transactions, permits an inference of intent to evade detection of illegal activity. *United States v. Alessi, supra,* 638 F.2d at 475-76. See *United States v. Payne,* 602 F.2d 1215, 1217 (5th Cir. 1979), *cert. denied,* __U.S.__, 100 S.Ct. 1079 (1980). Moreover, the inference of defendant's intent to use invoices manufactured from lost or stolen credit cards to obtain "money . . . or anything else of value" (15 U.S.C. §1644(a)) is supported by her simultaneous course of conduct in promptly withdrawing the funds generated by the scheme either in the form of cash or certified checks. *United States v. Kay, supra,* 545 F.2d at 493. See *United*

States v. Stoddart, 574 F.2d 1050, 1053 (10th Cir. 1978).

Defendant's argument that the requisite intent was not proved because it is conceivable that she unwittingly accepted lost or stolen credit cards presented by *others,* who made purchases just below the HHB floor limits in a knowing attempt to defraud and avoid detection, cannot be accepted. Defendant's intent was proved beyond a reasonable doubt by overwhelming circumstantial evidence which did not have to exclude all possible inferences other than that of guilt. *United States v. Elsbery, supra; United States v. Aadal,* 368 F.2d 962, 964 (2d Cir. 1966), *cert. denied,* 386 U.S. 970 (1967). In this light and in view of the other evidence, it is incredible that defendant could have been unaware that her store was not in fact generating the volume of sales represented by the credit card invoices she deposited almost daily to the HHB account, and from which she withdrew large amounts of cash on an equally regular basis. The sudden and extraordinary increase in apparent credit card sales following months of slack business done on a relatively small inventory,[9] as well as the two telephone inquiries regarding credit card use at HHB, remove any possibility of ignorance so total as to avoid a finding of guilty knowledge. See *United States v. Hanlon,* 548 F.2d 1096, 1101 (2d Cir. 1977); *United States v. Bernstein,* 533 F.2d 775, 796-98 (2d Cir.), *cert. denied,* 429 U.S. 998 (1976). Even if the Court were to find that she had not initially conceived the scheme to defraud, her subsequent involvement is so clear as to compel rejection of any assertion that she was ignorant of its nature and extent and not a knowing participant in it. *Id.* See *United States v. Joly,* 493 F.2d 672, 675 (2d Cir. 1974).

It is further suggested that defendant was the innocent victim of a scheme perpetrated through HHB by Adeeb "Eddie" Asaad, as to whom the government concedes there was evidence of involvement. The Court,

however, must be guided by the principle that the degree of Asaad's participation and culpability, if any, is not relevant to the determination of whether defendant intended to play the part that she did in a scheme to defraud. See *Standefer v. United States,* __U.S.__, 100 S.Ct. 1999 (1980).

Moreover, the evidence simply would not support a finding that, because of Asaad's involvement or influence, defendant did not knowingly violate 15 U.S.C. §1644(a). Defendant, as one of only two authorized signatories, was primarily responsible for the deposit of more than $200,000 in fraudulently created credit card sales invoices to the HHB account, and for the regular and complete withdrawal of the funds generated by the scheme. The government proved beyond a reasonable doubt that defendant herself went to Citibank, either alone or with Asaad, several times a week to effect this series of transactions. The consistent testimony of the Citibank tellers demonstrated that when defendant and Asaad came into the bank, she displayed a friendly and confident manner and played a major role in diverting the tellers' attention away from what they perceived to be a rather curious series of transactions. Rather than support some defense based upon a theory of mistake or duress, the evidence adduced at trial, when "examined in its totality, not by microscopic dissection of bits and pieces," *United States v. Barnes,* 604 F.2d 121, 156 (2d Cir. 1979), *cert. denied,* __U.S.__, 100 S.Ct. 1833 (1980), proved beyond a reasonable doubt that defendant knowingly violated 15 U.S.C. §1644(a) with regard to the credit cards referred to in counts 1-7 and 9-17.

Turning next to counts 18 through 24, alleging violations of 18 U.S.C. §1014, as to each count the government was required to establish, beyond a reasonable doubt,

(1) that Citibank's deposits were insured by the Federal Deposit Insurance Corporation,

(2) that defendant made false statements, and

(3) that defendant acted knowingly, for the purpose of influencing Citibank's action upon an advance, purchase or commitment.

See *United States v. Norberg,* 612 F. 2d 1 (1st Cir. 1979); *United States v. Carr,* 582 F.2d 242 (2d Cir. 1978); *United States v. Cleary,* 565 F. 2d 43 (2d Cir. 1977), *cert. denied,,* 435 U.S. 915 (1978); *United States v. Sabatino,* 485 F.2d 540 (2d Cir. 1973).

Since the government's proof that the deposits of Citibank are isured by the FDIC has not been seriously challenged, we may turn to the second element. The testimony of the Citibank tellers established beyond a reasonable doubt that defendant was primarily responsible for the deposits of at least 45 batches of credit card sales invoices, each one bearing the HHB imprint. Each sales/credit summary incorporated the "representation and warranties" that defendant had previously made by signing the January 2, 1979, account agreement, thereby taking contractual responsibility for all deposits to the HHB account at Citibank. It was also proved beyond a reasonable doubt that defendant signed at least 13 of the sales/credit summaries.

The express reiteration of these warranties, of which defendant was fully aware, and which included the warranty that each invoice submitted "represents a valid obligation of a Cardholder," was the legal equivalent of a statement as to the genuineness of the invoices. See *United States v. Payne, supra,* 602 F.2d at 1218. Moreover, defendant's conversations with the Citibank tellers throughout this entire series of transactions, in which she at least impliedly represented that theinvoices evidenced debts legitimately owed to her store, reinforced her written

representations and were oral statements which fall within the ambit of 18 U.S.C. §1014. *United States v. Sackett,* 598 F.2d 739, 741-42 (2d Cir. 1979); *United States v. Stoddart, supra.* Finally, as the Court has already found, each batch of invoices relating to counts 18 through 24 contained numerous invoices that had been generated through the use of lost, stolen or fraudulently obtained credit cards and did not represent bona fide sales at HHB resulting in valid obligations of cardholders. In the light of the discussion above, and mindful of the legislative purpose of 18 U.S.C. §1014 "to cover all undertakings which might subject the FDIC insured bank to risk of loss," *United States v. Stoddart, supra,* 574 F.2d at 1053, the Court concludes that the presentation of these invoices, evidencing as they did fictitious transactions, were false statements within the meaning of the bank fraud statute. *United States v. Norberg, supra,* 612 F.2d at 4-5; *United States v. Payne, supra,* 602 F.2d at 1217-18. See *United States v. Gleason,* 616 F.2d 2 (2d Cir. 1979).

It is argued that since the agreement defendant signed and the sales/credit summaries refer to CCSI, rather than Citibank, the statements made, if any, cannot be said to have been *made directly to* "a bank the deposits of which are insured by the" FDIC.

While it is true that 18 U.S.C. §1014 has in many cases been applied to false statements made directly to FDIC-insured banks in connection with a loan application, see, *e.g., United States v. Canas,* 595 F.2d 73 (1st Cir. 1979); *United States v. Braverman,* 522 F.2d 218 (7th Cir.), *cert. denied,* 423 U.S. 985 (1975), the statute itself is broadly worded and, by its terms, a violation exists whenever a person "knowingly makes any false statement . . . for the purpose of *influencing in any way* the action of" a bank insured by the FDIC (emphasis supplied). The courts have consistently construed this language as descriptive of the requisite intent and have expressly rejected assertions that the statute requires that the

misrepresentations be material, or that the bank must actually rely upon them, or even that the bank must be aware of the false statements. *United States v. Johnson,* 585 F.2d 119, 124 (5th Cir. 1978) ("The focus is on the defendant's intent rather than on the victim . . . The [bank's] awareness of the fraud is not relevant"). *United States v. Cleary, supra,* 565 F.2d at 46. Accord, *United States v. Tokoph,* 514 F.2d 597 (10th Cir. 1975); *United States v. Kernodle,* 367 F. Supp. 844, 851-52 (M.D. N.C. 1973), *aff'd,* 506 F.2d 1398 (4th Cir. 1974).

Moreover, reviewing the legislative history of 18 U.S.C. §1014, the courts have repeatedly rejected a restrictive construction of the statute, deeming it designed to protect against a broad variety of schemes that may influence the bank "in any way." *United States v. Payne, supra,* 602 F.2d at 1219 ("the intent of Congress was to incorporate in one codal section all of the business transactions of any of the specified agencies"). *United States v. Kovens,* 338 F.2d 611, 618 (5th Cir. 1964) ("the purpose of §1014 is to protect authorized functions of specified institutions from 'deceptive practices' "). Finally, the Court finds relevant here the observations that "section 1644 [of Title 15, U.S.C.] does not purport to be the exclusive vehicle for the federal prosecution of fraudulent credit card schemes . . . . " *United States v. Green,* 494 F.2d 820, 827 (5th Cir.), *cert. denied,* 419 U.S. 1004 (1974).

The government's proof established that Citibank w2as authorized to accept direct deposits of credit card invoices and to pay out in cash or by certified check the credited proceeds. It was also proven beyond a reasonable doubt that this form of transaction was utilized rather than deposit by mail addressed to CSMS or CCSI, as had been the practice of HHB for several months prior to August 1978. Moreover, even though the reiteration of the representation and warranties on the sales/credit summaries made reference to CCSI, defendant knew, of

course, that she was submitting these summaries directly to Citibank, and knew that she had previously signed the agreement setting forth the representations and warranties. See *United States v. Sabatino, supra,* 484 F.2d at 544-45. In the light of the authorities discussed above, and since the statute itself does not in any form contain the suggested restriction, the Court sees no good reason why 18 U.S.C. §1014 cannot reach statements made to a related corporation of an FDIC-insured bank and subsequently reinforced by direct oral representations to the bank, which are false and are made for the purpose of influencing the action of the bank.

Turning to the nature of the transactions in question, the original agreement and the sales/credit summaries term defendant the "seller" of invoices which are deemed to be assignable evidences of debt. Pursuant to the "purchase" of these invoices, Citibank in fact advanced over $177,000 in cash upon the presentment of checks signed by defendant. Under these circumstances, the government's proof established, beyond a reasonable doubt, that the purpose of these transactions was to influence the action of Citibank upon a "purchase" or "commitment to pay." See *United States v. Norberg, supra* (18 U.S.C. §1014 covers presentation of fraudulent invoices to obtain release of monies previously committed); accord, *United States v. Kovens, supra.* See also *United States v. Payne, supra* (18 U.S.C. §1014 reaches "check kiting" scheme whereby defendant received extensions of credit on a checking account by presentation of checks evidencing fictitious sales).

Finally, the government had to prove beyond a reasonable doubt that defendant acted knowingly, "for the purpose of influencing," Citibank to act as it subsequently did. The Court's discussion above, concluding that defendant knowingly used invoices generated by lost, stolen or fraudulently obtained credit cards to obtain large

amounts of money, is fully applicable to the question whether she knew the statements she was making in connection with the HHB account were false. As the Court has already concluded, defendant had to know that all of the invoices she submitted could not represent bona fide debts owed to HHB as a result of genuine sales effected at the store. Defendant's intent with regard to a charged violation of 18 U.S.C. §1014 may be inferred from all of the facts and circumstances in proof, *United States v. Braverman, supra,* 522 F.2d at 220, and the sheer repetition of these transactions allows an inference of willful misrepresentation. *United States v. Payne, supra,* 602 F.2d at 1217. In addition, the fact that defendant signed at least 29 checks which were successfully presented for cashing or certification is probative of her intent to make the deposits for the purpose of influencing Citibank to release these monies to her. *United States v. Stoddart, supra,* 574 F.2d at 1053. The conclusion is inescapable that defendant, as charged in counts 18 through 24, acted knowingly in making false statements for the purpose of influencing the action of Citibank in violation of 18 U.S.C. §1014.

VERDICT

Accordingly, it is the verdict of the Court that defendant is guilty of the offenses charged in counts 1 through 7 and 9 through 24 of indictment 80 CR 9(S). Defendant is acquitted of the charge in count 8.

The defendant and her attorney shall appear before the Court on April 15, 1981, at 4:00 p.m. for further proceedings preliminary to sentence.

SO ORDERED.

s/Edward R. Neaher
U.S.D.J.

Dated: Brooklyn, New York
April 15, 1981

APPENDIX "C"
STATUTES INVOLVED

Section 1644 of Title 15, U.S.C., underlying Counts 1 through 17, provides in relevant part:

> "(a) Whoever knowingly in a transaction affecting interstate or foreign commerce, uses or attempts or conspires to use any founterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained credit card to obtain money, goods, services, or anything else of value which within any one-year period has a value aggregating $1,000 or more . . . shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

Section 1014 of Title 18, U.S.C., underlying Counts 18 through 24, provides in relevant part:

"Whoever knowingly made any false statements or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of . . . any bank the deposits of which are insured by the Federal Deposit Insurance Corporation . . . upon any application, advance, discount, purchase agreement, repurchase agreement, commitment, or loan . . . shall be fined not more than $5,000 or imprisoned not more than two years, or both."

Amend. 6 Constitution

AMENDMENT VI—JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of

the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.